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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Fourth report prepared by Mr. Stanislav Chernichenko and Mr. William Treat

Addendum 1

Draft declaration on the right to a fair trial and a remedy

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Introduction

1. The Special Rapporteurs have reviewed treaties and other international instruments protecting the right to a fair trial. They have studied interpretations of the right to a fair trial by the Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They have also prepared a study of the right to habeas corpus, amparo, and similar procedures.

2. In addition, the Special Rapporteurs have gathered materials about national constitutions, laws, rules, and practices relating to the right to a fair trial from more than 65 nations. In this regard, they have very much appreciated the information they have received from 28 Governments, as well as intergovernmental and non-governmental organizations, bar associations, and individuals.

3. In its resolution 1992/21 of 27 August 1992 the Sub-Commission anticipated the preparation by the Special Rapporteurs of their final report in 1994, containing recommendations for strengthening the implementation of the right to a fair trial in the light of interpretations of the right by international bodies and contemporary national practices. The Special Rapporteurs expect to prepare their final report for the Sub-Commission at its forty-sixth session in 1994.

4. In anticipation of the formulation of their final recommendations, the Special Rapporteurs have sought to derive from international interpretations of the right to a fair trial and a remedy, as well as from national laws and practices, those common elements which might serve as the basis for a draft declaration on the Right to a fair trial and a remedy. In preparation for discussions at the Sub-Commission in future sessions, the Special Rapporteurs have prepared a preliminary draft which is contained in the present addendum to the fourth report. In this regard the Special Rapporteurs and the Sub-Commission should continue to assure that the present fair trial standards in existing international law are not weakened in the process of elaborating upon and delineating the draft declaration.

5. The Special Rapporteurs submit the following resolution and draft declaration on the right to a fair trial and a remedy as a basis for discussions at the Sub-Commission in future sessions:

(--/--) Draft declaration on the right to a fair trial and a remedy

The General Assembly,

Recalling articles 3, 5, 8, 9, 10 and 11 of the Universal Declaration of Human Rights adopted in its resolution 217 A (III) of 10 December 1948, which affirms the right of every person to a fair and public hearing by an independent and impartial tribunal,

Recalling also article 14 of the International Covenant on Civil and Political Rights contained in the annex to its resolution 2200 A (XXI) of 16 December 1966, which reaffirms the right of every person to a fair and public hearing,

Recalling further many other articles of the International Bill of Human Rights which relate to the right to a fair trial and a remedy,

Noting the right to a fair trial and a remedy provided in existing regional human rights treaties, including articles 4, 6 and 7 of the African Charter on Human and Peoples' Rights, articles 4, 5, 7, 8 and 11 of the American Convention on Human Rights, and articles 2, 5, 6, 7 and 8 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms,

Noting also that the Geneva Conventions of 12 August 1949 for the protection of war victims and the Additional Protocols thereto of 1977 relating to the Protection of Victims of Armed Conflicts protect judicial guarantees during international and non-international armed conflicts,

Noting further the guarantees of a fair trial and a remedy incorporated in articles 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Noting the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment contained in the annex to General Assembly resolution 43/173 of 9 December 1988; the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held from 26 August to 6 September 1985; the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held from 27 August to 7 September 1990;

Having examined the preparatory report (E/CN.4/Sub.2/1990/34), the preliminary report (E/CN.4/Sub.2/1991/29), the progress reports (E/CN.4/Sub.2/1992/24 and Add.1-3 and E/CN.4/Sub.2/1993/--) and the final report (E/CN.4/Sub.2/1994/-- and Add.1-2) submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities by the Special Rapporteurs on the right to a fair trial,

Mindful that the Special Rapporteurs recommended the elaboration of a draft declaration on the right to a fair trial and a remedy,

Bearing in mind General Assembly resolution 41/120 of 4 December 1986 on setting international standards in the field of human rights,

Convinced that the adoption of the draft declaration would make an important contribution to the protection of human rights by clarifying and elaborating upon the content of the right to a fair trial and a remedy,

1. Adopts the Declaration on the Right to a Fair Trial and a Remedy, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Sub-Commission on Prevention of Discrimination and Protection of Minorities and its Special Rapporteurs on the right to a fair trial for their contribution to the elaboration of the Declaration;

3. Requests the Secretary-General to inform the States Members of the United Nations of the Declaration;

4. Urges that efforts be made so that the Declaration becomes generally known and respected.

ANNEX

Draft declaration on the right to a fair trial and a remedy

Provisions applicable to all adjudicative proceedings 1/

1. In the determination of any criminal charge against a person, or of the person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Any judgement rendered in a criminal case or in a suit at law shall be made public, except where the interests of juvenile persons otherwise require or the proceedings concern matrimonial disputes or the guardianship of children.

Fair hearing

2. A "fair ... hearing" requires respect for the principle of equality of arms between parties to the proceedings, whether they be civil, criminal, administrative, or military.

3. All persons shall be equal before the courts and tribunals. The right of every individual to a fair trial is recognized without any distinction whatsoever as regards race, colour, sex, language, religion, political or other convictions, national or social origin, means or other circumstance.

4. If a person's rights and obligations may be adversely affected in a suit at law or by particularized actions or inactions taken or proposed by a public authority, the court or the public authority shall give the person adequate notice of the nature and purpose of the proceedings and shall give the person a fair and public hearing by a competent, independent and impartial tribunal established by law.

5. A fair hearing requires that a person entitled to adequate notice of the nature and purpose of proceedings shall have the right:

(a) To adequate opportunity to prepare a case;

(b) To present arguments and evidence, and to meet opposing arguments and evidence, either in writing, orally or by both means;

(c) To consult and be represented by counsel or other qualified persons of the person's choice during all stages of the proceedings;

(d) To consult an interpreter during all stages of the proceedings, if he or she cannot understand or speak the language used in the court or tribunal;

(e) To have their rights and obligations affected only by a decision based solely on evidence known to parties to public proceedings;

1/ For definitions of terms in this section and elsewhere in the draft declaration, see "Use of terms," below.

(f) To have their rights and obligations affected only by a decision rendered without undue delay and as to which the parties are provided adequate notice thereof and the reasons therefor:

(i) Factors relevant to what constitutes undue delay include, inter alia, the complexity of the case, the conduct of the parties, the conduct of other relevant participants, whether an individual is detained pending proceedings, and the interest of the persons at stake in the proceeding;

(g) To appeal decisions to a higher administrative authority, a judicial tribunal, or both.

Public hearing

6. In order to hold a "public hearing", the court or tribunal shall make information about the time and venue of the public hearing available, and provide adequate facilities for attendance by interested members of the public.

7. In a public hearing, the court or tribunal may not limit attendance to only a particular category of people and should allow local, national and international observers to attend, so as to verify that justice is done and seen to be done. Representatives of the press and of other media may be present at a public hearing.

8. Exceptions to a public hearing shall be narrowly construed. In regard to each exception, the tribunal shall determine whether the strong public and individual interest in seeing that justice is done would be substantially outweighed by the rationale for the exception which is proposed for closure from public attendance. If an exception to the right to a public hearing is found to justify at least some degree of closure, the tribunal should also consider closing only portions of the proceedings or should consider taking evidence in camera so as to implement to the greatest extent possible the right to a public hearing.

9. The press and the public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court or tribunal in special circumstances where publicity would prejudice the interests of justice.

10. In further defining these exceptions to the right to a public hearing, the public may be excluded from hearings on the grounds of morals, where the testimony will have such a corrupting or intimidating influence on the observers or participants as to outweigh the strong public and individual interest in a public hearing. Moral grounds for excluding the public may be asserted primarily in the trial of cases involving sexual offences. The public may be excluded from hearings on the grounds of a grave threat to public order; such a threat might outweigh the strong public and individual interest in a public hearing for cases of disciplinary proceedings in prisons. The public may be excluded from hearings because of national security concerns when hearings involve State defence secrets in a democratic society. Privacy

interests may merit excluding the public from hearings relating to family issues, such as divorce and guardianship, and from juvenile proceedings involving sexual offences, in so far as public proceedings would constitute a clearly unwarranted invasion of personal privacy outweighing the strong public and individual interest in a public hearing.

11. A public hearing shall occur where the merits of the case are being examined - either at the trial or appellate level - but not necessarily at both levels.

12. An individual party may waive his or her right to a public hearing if consent is given of one's own free will, is made in an unequivocal manner and preferably in writing, and does not infringe any important public interest in seeing that justice is done.

Independent tribunal

13. Every person has the right to a fair hearing of his or her case by a legally constituted competent, independent and impartial court or tribunal.

14. In order to be "independent", a tribunal shall be established by law to have adjudicative functions to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. A tribunal may be established by legislative, executive or judicial power.

15. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the tribunal's competence as defined by law.

16. A tribunal's jurisdiction may be determined, inter alia, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties and the consent of the parties.

17. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

18. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This provision is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences by the judiciary, in accordance with the law.

19. A court shall be independent from the executive branch. The executive branch in a State shall not be able to interfere in a court's proceedings and a court shall not act as an agent for the executive against an individual citizen.

20. The term of office of judges and members of a tribunal, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

21. Judges or members of a tribunal, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

22. Promotion of judges and members of tribunals, where such a system exists, should be based on objective factors, in particular ability, integrity and experience.

23. It is essential that a judge or member of a tribunal should not be subject to any authority in the performance of his or her duties, aside from duly registered appeals after judgement has been announced.

24. A tribunal shall be independent from the parties in the case.

Impartial tribunal

25. A tribunal shall be "impartial"; it shall base its opinion only on objective arguments and evidence presented. The judiciary shall decide matters before them without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

26. The impartiality of a tribunal may be subject to challenge if the public is entitled to question, on the basis of ascertainable facts, that the fairness of the judge or tribunal was capable of appearing open to doubt. Three relevant factors should be considered in determining impartiality: whether the trial judge's position allows him or her to play a crucial role in the proceedings; whether the judge may have a pre-formed opinion which would weigh heavily on the decision-making; and whether a judge would have to rule on an action taken in a prior capacity.

27. A tribunal lacks impartiality if, inter alia, a former public prosecutor or attorney sits as a judge on a case in which he or she prosecuted or served as counsel to a party; a trial judge actively participated in the secret, preparatory investigation of a case; or a judge has some connection with the case which might bias the decision.

28. In the circumstances identified in the preceding paragraphs and in other cases where impartiality appears open to doubt, judges and members of a tribunal have the obligation to recuse themselves.

29. A judge may not consult a higher authority before rendering a decision in order to ensure that his or her decision will be upheld.

Right to a remedy

30. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the rights granted by the constitution, by law, or by the present Declaration, notwithstanding that the acts had been committed by persons acting in an official capacity.

31. Any person claiming such a remedy shall have such a right determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, which may include judicial remedy.

32. Any person claiming such a remedy shall have the right to have the remedy enforced by competent authorities.

Provisions applicable to arrest and detention

33. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

34. A person may be detained only for probable cause or pursuant to a warrant from a competent authority.

35. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.

36. Anyone who is arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

37. Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful:

(a) Any person arrested or detained has the right to be brought within 24 hours before a judge or authorized judicial officer who shall review the lawfulness of his or her detention and shall order release if the detention is not lawful. The judge or judicial officer shall be authorized by law to exercise judicial power;

(b) Any person arrested or detained shall have prompt access to a lawyer, and in any case not later than 24 hours from the time of arrest or detention. Access to a lawyer includes the attributes of the right to counsel prescribed in the paragraphs below relating to that subject.

38. States shall ensure the right to habeas corpus, amparo or similar procedures. The courts shall at all times hear and act upon petitions for habeas corpus, amparo, or similar procedures. No circumstances whatever may be invoked as a justification for denying the right to habeas corpus, amparo, or similar procedures.

39. Detention shall be administered by competent authorities established by law and duly identified.

40. Detainees shall be housed in places established by law for that purpose and duly identified.

41. The court with judicial control over the detainee shall be promptly informed that a person has been detained and shall have authority over the officials detaining an individual.

42. The authorities which arrest a person, keep him or her under detention, or investigate the case shall exercise only the powers granted to them under the law, and the exercise of these powers shall be subject to a judicial or other authority.

43. The judiciary shall at all times have authority over executive action resulting in detention.

44. Military courts do not have legal authority over civilians except in narrowly defined circumstances, for example, when the civilian has committed an offence in a military facility.

Right to humane treatment

45. All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. Persons under any form of detention or imprisonment shall not be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, such persons shall not be subjected to the following cruel, inhuman or degrading treatment:

(a) No detainee shall be subjected to incommunicado detention. Communication of the detained or imprisoned person with the outside world shall not be denied for more than a matter of days;

(b) No detainee shall be denied prompt and adequate medical care including necessary medication. No detainee shall be subjected to compulsory medical experimentation;

(c) Accused persons shall be segregated from convicted persons and have the right to separate treatment appropriate to their status as unconvicted persons;

(d) Accused juvenile persons shall be segregated from adults and from juvenile persons whose guilt has been adjudicated. States shall set a minimum age below which a juvenile may not be deprived of his or her liberty;

(e) All detainees have the right to write, send, and receive correspondence. Restrictions on correspondence shall not constitute an arbitrary or unlawful interference with the detainee's correspondence;

(f) All detainees have the right to receive visits from attorneys, family, friends, and others at regular intervals under necessary supervision.

46. All detainees have the right to trial within a reasonable time or release. Pre-trial detention is justified only to prevent flight, interference with evidence or the recurrence of crime.

47. Pre-trial release may be made subject to guarantees, such as bail, to assure appearance at trial.

Provisions applicable to proceedings relating to criminal charges

Notice

48. Any person charged with a criminal offence shall be informed promptly, in detail, and in a language which he or she understands, of the nature and cause of the charge against him or her:

(a) The accused has the right to be informed as soon as a charge is first made by a competent authority. A person suspected of a crime shall be notified as soon as a court or the prosecution decides to take procedural steps against him or her, or publicly names him or her as a suspect;

(b) The purpose of the notice is to inform the accused in a manner that would allow him or her to prepare a defence. The notice shall be provided in time to allow the accused a fair opportunity to examine or have examined the witnesses against him or her and to secure the attendance of witnesses on his or her behalf. The notice shall be provided before the accused is required to make any statement;

(c) The purpose of the notice is also to enable a person to take immediate steps to secure his or her release; hence, the notice shall include details of the charges or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused. The arresting authorities shall have sufficient evidence to show that the detention falls within the law on which the charge is based;

(d) The accused has the right to translation of the notice of the charges into a language which he or she understands. The notice of charges shall actually be communicated to the accused and not only to a representative or agent; notice in a language understood only by the defence counsel is insufficient.

Right to counsel

49. The accused has the right to defend himself or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms:

(a) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend himself or herself through legal assistance of his or her own choosing;

(b) This right applies during all stages of any criminal prosecution, including, inter alia, preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings;

(c) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A court may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

Right to free legal assistance

50. The accused has the right to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the accused in any such case if he or she does not have sufficient means to pay for it:

(a) The interests of justice in a particular case should be determined by consideration of the seriousness of the offence of which the defendant is accused and the severity of the sentence which he or she risks;

(b) The interests of justice always require counsel for an accused in any capital case. An accused in a capital case has the right to choose his or her own legal representative at all stages of the case. An accused in a capital case may contest the choice of his or her court-appointed lawyer. A prisoner sentenced to death shall have the right to appointed counsel for petition for pardon or clemency;

(c) An accused may not be denied counsel on the ground that he or she has or has had the opportunity to defend himself or herself, but does not wish to defend himself or herself.

51. An accused has a right to an effective defence. Attorneys appointed by the court shall provide effective defence counsel:

(a) When legal assistance is provided by the court, the lawyer appointed shall be qualified to represent and defend the accused;

(b) A lawyer appointed by the court shall have the training and experience necessary to represent and defend the accused in cases of the nature and seriousness involved in the matter;

(c) When legal assistance is provided by the court, the lawyer shall be free to exercise his or her professional judgement in an independent manner, free of influence from the State or the court;

(d) When legal assistance is provided by the court, the lawyer shall actually advocate in favour of the accused. The lawyer representing the accused may exercise professional judgement in choosing the strategy of the defence;

(e) Lawyers appointed to defend the accused shall be sufficiently compensated to provide an incentive to accord the accused adequate and effective representation.

Right to adequate time and facilities for the preparation of a defence

52. The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence:

(a) The accused has a right to see an attorney during all stages of any criminal proceeding, including any preliminary investigation in which evidence is taken, any period of administrative detention, trial and any appeal;

(b) The accused may not be tried without notifying his or her counsel of the trial date and of the charges in time to allow adequate preparation of a defence;

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include, inter alia, the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence;

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence. The essential elements of the right to adequate facilities are the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence:

(i) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality;

(ii) The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Facilities shall be provided such that communications with counsel shall be made under circumstances in which the confidentiality of the communications is preserved;

(iii) Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential;

(iv) The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate himself or herself;

(v) It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time;

(vi) The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence;

(vii) Before judgement or sentence is rendered, the accused and his or her defence counsel shall have the right to know all the evidence which may be used to support the decision. All evidence submitted must be considered by the court;

(viii) Following a trial and before any appellate proceeding, the accused or the defence counsel has a right to access to (or to consult) the evidence which the court considered in making a decision and the court's reasoning in arriving at the judgement.

The right to an interpreter

53. The accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used in court:

(a) The right to an interpreter applies when the accused or a defence witness has difficulty understanding or expressing himself or herself in the court's language;

(b) The right to an interpreter does not extend to the right to express oneself in the language of one's choice if the accused or the defence witness is sufficiently proficient in the language of the court;

(c) The right to an interpreter applies to both nationals and aliens;

(d) The right to an interpreter applies at all stages of the proceedings, including pre-trial proceedings;

(e) The right to an interpreter applies to written as well as oral proceedings. The right extends to translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence;

(f) The interpretation or translation provided shall be adequate to permit the accused to understand the proceedings and for the tribunal to understand the testimony of the accused or defence witnesses;

(g) The right to interpretation or translation cannot be qualified by a requirement that the accused pay for the costs of an interpreter or translator. Even if the accused is convicted, he or she cannot be required to pay for the costs of interpretation or translation.

Right to trial without undue delay

54. Every person charged with a criminal offence has the right to a trial without undue delay:

(a) The right to a trial without undue delay means the right to a trial which produces a final judgement and a sentence without undue delay;

(b) In assessing whether there has been undue delay, the period of review of any conviction or sentence shall be included in the assessment;

(c) The right to a trial without undue delay does not depend upon assertion of that right by the accused. The accused is not required to demand a trial without undue delay in order to preserve his or her right in this regard;

(d) Factors relevant to what constitutes undue delay include, inter alia, the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceeding.

Rights during a trial

55. In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor:

(a) The prosecution and defence shall be allowed equal time to present evidence;

(b) Prosecution and defence witnesses shall be given equal treatment in all procedural matters;

(c) Evidence unlawfully obtained shall not be used as evidence against the accused or against any other person in any proceeding.

56. The accused is entitled to a hearing in which an individualized consideration of culpability is afforded. Group trials in which many persons are involved may violate the person's right to a fair hearing.

57. The accused has the right to be tried in his or her presence:

(a) The accused has the right to appear in person before the court;

(b) If the accused is personally served with adequate notice of the date, time and place of the trial (in a timely matter, in sufficient detail, and in a language he or she understands) and the accused fails to appear for trial, the accused may be tried in absentia;

(c) If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the

accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge;

(d) The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.

58. The accused has the right not to be compelled to testify against himself or herself or to confess guilt:

(a) Any confession or other evidence obtained by any form of coercion or force may not be admitted into evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion;

(b) Silence by the accused may not be used as evidence to prove guilt.

59. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law:

(a) The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution. The criminal charge shall be proved to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law;

(b) Public officials shall maintain a presumption of innocence. This provision applies to the judge presiding over the trial and to any other public official who deals with the case in any way. The accused is entitled to the benefit of the doubt during the trial. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect;

(c) Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence;

(d) In applying the presumption of innocence, a State is not required to reimburse a person who has been found not guilty for the cost of his or her defence;

(e) In applying the presumption of innocence, the State may not require a person, who has been found not guilty of a criminal offence, to pay any portion of the costs of prosecution.

60. The accused has a right to examine or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her:

(a) The contentious nature of a trial is regarded as one effective means of ensuring its fairness;

(b) The accused's right to obtain the attendance and examination of witnesses on his or her behalf may be waived by counsel if such a waiver is properly within the professional judgement of the attorney;

(c) The prosecution shall provide the defence with the names of the witnesses it intends to call at trial within a reasonable time prior to trial which allows the defendant sufficient time to prepare his or her defence;

(d) The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth;

(e) The accused has the right to be present during the testimony of a witness. This right may be limited only for exceptional circumstances such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified;

(f) A trial may also be conducted in the absence of an individual accused of any offences against the peace and security of humanity, if that individual is a fugitive from justice or has died before the commencement of such a trial, but when the consequences of the offences of which the person stands accused are still extant and the court examination is necessary for the protection of human rights and fundamental freedoms and to prevent perpetration of such offences in the future;

(g) If the defendant is excluded or if the presence of the defendant cannot be ensured, the defendant's counsel shall always have the right to be present to preserve the defendant's right to examine the witness;

(h) If the presence of the defendant or any party cannot be ensured when the sentence or decision is announced, measures shall be taken to ensure that the defendant or any other party is informed as quickly as possible concerning the substance of the verdict or decision and the possibility of appeal against it;

(i) If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant shall have the opportunity to cross-examine the witness at trial;

(j) The use of testimony of anonymous witnesses during a trial is a violation of the defendant's right to examine witnesses against him or her.

Right to benefit from a lighter sentence or administrative sanction

61. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

62. A lighter penalty created any time before an accused's sentence has been fully served should be applied to any offender serving a sentence under the previous penalty.

63. Administrative tribunals conducting disciplinary proceedings shall not impose a heavier penalty than the one that was applicable at the time when the offending conduct occurred. If, subsequent to the conduct, provision is made by law for the imposition of a lighter penalty, the person disciplined shall benefit thereby.

Second trial for same offence prohibited

64. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Sentencing and punishment

65. Punishments constituting a deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

Appeal

66. Everyone convicted in a criminal proceeding shall have the right to review of his or her sentence by a higher tribunal:

(a) The right to appeal shall provide a genuine and timely review of the case. If exculpatory evidence is discovered after a person is tried and convicted, the right to appeal or some other post-conviction procedure shall permit the possibility of correcting the verdict if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused;

(b) A court shall stay execution of any sentence while the case is on appeal to a higher tribunal, unless the accused voluntarily accepts the earlier implementation of sentence.

67. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

68. When a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

69. Every person convicted of a crime has a right to seek pardon, amnesty or commutation of sentence. Pardon or commutation of sentence may be granted in all cases of capital punishment.

General clauses

70. There shall be no restriction upon or derogation from any element of the right to a fair trial and a remedy recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that the present Declaration does not recognize such rights or that it recognizes them to a lesser extent.

71. Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights or any other relevant treaty or international instrument.

72. While the present Declaration is not principally intended to apply to proceedings for juvenile offenders, there are certain protections that relate specifically to juvenile offenders. Juvenile offenders should be entitled to procedures no less protective of their rights than the rights provided in the present Declaration and other international instruments, including, inter alia, the Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989; the Minimum Rules for the Administration of Juvenile Justice, General Assembly resolution 40/33 of 29 November 1985; and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly resolution 45/113 of 14 December 1990.

73. No circumstances whatsoever, whether a threat of war, a state of international or non-international armed conflict, internal political instability or any other public emergency may be invoked to justify derogations from the right to a fair trial or a remedy.

Use of terms

74. For the purposes of the present Declaration:

(a) A "criminal charge" is defined by the nature of the offence and the nature and degree of severity of the penalty incurred. An accusation may constitute a criminal charge although the offence is not classified as criminal under national law:

(i) Criminal charges relate to all offences with penalties involving a serious deprivation of liberty. Imprisonment is always a serious deprivation of liberty. Expulsion from one's country by administrative decree is also a serious deprivation of liberty which requires the guarantees of a fair criminal trial;

(ii) Criminal charges do not constitute actions by disciplinary bodies when the penalty imposed is only a reprimand or warning;

(b) The "determination of rights and obligations in a suit at law" is defined by the character of the rights at issue. Civil rights and obligations include all proceedings that are decisive for private rights and obligations, including proceedings before administrative tribunals:

(i) Civil rights and obligations may be determined in proceedings involving such matters as bankruptcy, commitment to a mental institution, compensation claims against domestic authorities, contractual rights and obligations, drivers' licences, family-related issues, health insurance benefits, labour disputes, land consolidation issues, libel, personal injury claims, professional employment qualifications and rights, property rights, and scope and ownership of patents, as well as other proceedings in which a person has the right to appear and present evidence;

(ii) Proceedings as to civil rights and obligations do not require that both parties to the proceedings be private persons; hence, such proceedings encompass hearings before administrative tribunals where one of the parties is a public authority and the other is a private person;

(c) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(d) "Detained person" means any individual deprived of personal liberty except as a result of conviction for an offence;

(e) "Imprisoned person" means any individual deprived of personal liberty as a result of conviction for an offence;

(f) "Detention" means the condition of detained persons as defined above;

(g) "Imprisonment" means the condition of imprisoned persons as defined above.